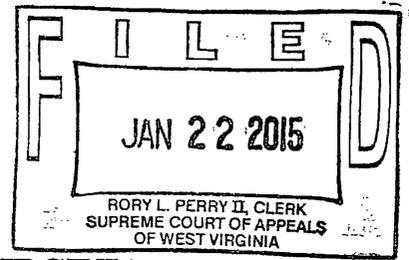


No. 14-0926



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON, WEST VIRGINIA

FROM THE CIRCUIT COURT OF JACKSON COUNTY, WEST VIRGINIA

**KENNAD L. SKEEN, II, Prosecuting
Attorney of Jackson County, W.Va.,
on behalf of the Jackson County
Sheriff's Department,**

Plaintiff,

v.

Case No. 13-P-16

\$32,641.00, et al.,

Defendant.

BRIEF OF RESPONDENT

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RESPONDENT'S BRIEF

**TO THE HONORABLE JUSTICES OF THE
SUPREME COURT OF APPEALS WEST VIRGINIA**

I. ASSIGNMENTS OF ERROR¹

1. The record did not support a finding by the Circuit Court that Sharon Messer had any knowledge of illegal activity or that any illegal transaction was taking place.

¹ As taken, verbatim, from the *Petition*, page 4.

2. The Circuit Court erred by not properly applying *Dean v. State of West Virginia* and the appropriate analysis as to the comparison of assets and values to the minimal fine required pursuant to the charge in Jackson County.

3. The record did not support a finding by the Circuit Court that certain seized property were purchased pursuant to an illegal drug transaction or was the product of an illegal drug transaction.

4. The record did not support a finding as to the connection between any of the assets seized with any illegal drug activity.

II. STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

On February 28, 2013, the Jackson County Sheriff's Department obtained and executed a search warrant on the residence of Hubert Dwayne Messer and Sharon White Messer, located at Route 1 Box 149-A, Gay, Jackson County, West Virginia. Hubert Messer and Sharon Messer (hereinafter, referred to collectively as "the Messers") are a lawfully wed couple. The property in question includes a dwelling house, a large barn, and 54.09 acres, on which the Messers have an operating horse farm. The search warrant was executed for the purpose of retrieving stolen firearms, believed to be in the possession of Mr. Messer, which were in fact discovered during the search of the property, and were recovered by the police.

On March 5, 2013, the Jackson County Sheriff's Department obtained and executed a second search warrant on the same Messer property. This search warrant was obtained for the purpose of locating and seizing any contraband relating to the illegal sale and

distribution of controlled substances. During this search, the police seized all firearms located on the property. Mr. Messer was subsequently charged with one felony count of “Receiving or Transferring Stolen Goods in Excess of \$1,000.00,” in violation of West Virginia Code, § 61-3-18, for possession of stolen firearms.

On May 24, 2013, the Jackson County Sheriff’s Department, as represented by the State of West Virginia, filed a *Petition for Forfeiture*, relating to real and personal property belonging to the Messers.² The entire list of property included in the *Petition for Forfeiture* is set forth in *Respondent’s Exhibit A*, as attached.

A hearing on the *Petition for Forfeiture* was held over the course of two, nonconsecutive days, March 7, 2014 and March 13, 2014, before the Honorable Thomas C. Evans, III, of the 5th Judicial Circuit of West Virginia. *See Hearing Transcripts, as attached to Petition.* During the course of the hearings, each party was afforded an opportunity to put on testimony, present evidence, cross-examine witnesses, raise objections, and make arguments. Following the taking of evidence, the Circuit Court did order both parties to submit *Proposed Orders*.

Following the presentation of evidence in the forfeiture hearing, but prior to the ruling of the Circuit Court, Mr. Messer entered a guilty plea in the United States District Court Southern District of West Virginia. Mr. Messer pled guilty to: Count One of the

² According to the West Virginia Department of Motor Vehicles, there is a lien upon the 2007 Dodge 3500 dually truck VIN#3D7MX49C87G730087, which is held by GE Money Bank. Further, Farm Credit of the Virginias, ACA, has a “Deed of Trust” related to the real property located at Route 1 Box 149-A, Gay, West Virginia. No other person or corporation holds a possessory or statutory lien against any of the real or seized property.

Indictment, which charged that Mr. Messer “knowingly and intentionally” distributed oxycodone, a Schedule II controlled substance, in violation of 21 U.S.C. § 841; and Count Three of the Indictment, which charged that Mr. Messer “knowingly received, possessed, concealed, stored, and disposed of” five specified firearms, in violation of 18 U.S.C. §§ 922(j) and 924(a)(2). As a condition of his plea, Mr. Messer waived “any ownership interest he may have in approximately \$35,342 in U.S. currency seized from his residence on or about February 28, 2013”, and to “approximately 46 firearms which were seized from his residence on or about February 28, 2013, March 4, 2013, and April 18, 2013.” *See Exhibits.*

On August 7, 2014, the Circuit Court entered its *Judgment Order*, in which it found that the real and personal property listed in the *Petition of Forfeiture*, with few exceptions, was “obtained or retained by Mr. and Mrs. Messer through the course of narcotic trafficking, either directly or indirectly, and/or has been used by Mr. and Mrs. Messer to obtain and/or transport drugs for the purpose of illegal narcotic trafficking.” *Judgment Order*, pg. 6. After a meticulous assessment of the case, wherein the Circuit Court compared the testimony at the hearings to the items to be forfeited, the Circuit Court ordered as follows: all United States currency is forfeited to the State; all real property, with the exception of the dwelling house, is forfeited to the State, subject to the rights of the lienholder, Farm Credit of the Virginias, AVA; and all personal property is forfeited to the State, *except for* the 2000 Ford F350 truck and the Mahindra 4WD model 5530 tractor with the loader.

The Messers properly filed an appeal with this Court, arguing that the Circuit Court's *Judgment Order* was erroneous.

B. STATEMENT OF FACTS

Over the course of hearing on March 7, 2014 and March 13, 2014, the State presented overwhelming evidence relating to the significant narcotics trafficking perpetrated by the Messers. Much of this evidence was presented through the testimony of Corey Raines, Travis Thompson, Carl Eugene "J.C." Casto, Jr., and Doyle "D.J." Brown, Jr.³, each of whom testified to having intimate, first-hand knowledge of Mr. Messer's drug deals.

Mr. Raines, Mr. Thompson, Mr. Casto, and Mr. Brown each testified that they bought a myriad of controlled substances from Mr. Messer, including Percocet®, Roxicodone®, Oxycontin®, Lortab®, and Vicodin®, as well as generic hydrocodone and oxycodone pills. The active ingredients for each of these types of pills are either oxycodone or hydrocodone, and are classified under federal and West Virginia law as Schedule II opioid narcotic controlled substances. It is uncontroverted that Mr. Messer only has a valid prescription for what is commonly referred to as "Hydro-75s" or generic hydrocodone in 75 milligrams. There is also no evidence that Mrs. Messer had a valid prescription for any controlled substance which has an active ingredient of either hydrocodone or oxycodone.

Despite not having a valid prescription for these pain pills, Mr. Messer was able to sell these drugs at a high volume over the course of several years: Mr. Brown testified that

³ The spellings of names as used in the *Respondent's Brief* are consistent with court-filings, including the *Judgment Order* and issued subpoenas.

he estimated that over a seven year span he bought pain pills from Mr. Messer over a thousand times; Mr. Casto testified that over the course of two or three years, he gave Mr. Messer thousands of dollars in cash in exchange for pain pills; and Mr. Thompson testified that for a period of a few years, he made weekly, if not daily, purchases of pain pills from Mr. Messer. All four of these lay witnesses testified that they not only purchased pain pills from Mr. Messer, but that they also witnessed Mr. Messer selling pain pills to other persons. Moreover, Mr. Raines and Mr. Brown testified that they sold pills on behalf of Mr. Messer. Mr. Raines testified that on fifteen to twenty occasions Mr. Messer gave Mr. Raines 60 to 100 pills, per occasion, for Mr. Raines to sell. After Mr. Raines sold the provided volume of pills, Mr. Messer would take \$35.00 per pill in the sales, leaving Mr. Raines with the remainder of any money made from his own sales. Similarly, Mr. Brown testified that he sold pills for Mr. Messer in order to support Mr. Brown's own drug habit.

Although there was no testimony in which Mrs. Messer directly delivered pain pills to other persons, there was testimony that she aided her husband in his illegal activities. Mr. Raines testified that on five or six occasions Mr. Messer asked Mrs. Messer to get the pills, that Mrs. Messer went into the dwelling house on the Messer property, that Mrs. Messer returned with a few pills, that Mrs. Messer handed the pills to Mr. Messer, and that Mrs. Messer would then leave the area – which was usually the Messer barn – and that after Mrs. Messer left, Mr. Messer would proceed with the drug deal. According to Mr. Raines, when Mr. Messer asked Mrs. Messer to fetch the pills, Mr. Messer would not tell Mrs. Messer which pills to get, or where the pills were located. The pills in question would be brought to Mr. Messer in a small metal container or a pill bottle.

Likewise, Mr. Thompson testified that Mr. Messer would ask Mrs. Messer to bring him pills, and that she would return with a glass jar filled with different pills. According to Mr. Thompson, Mrs. Messer would be close by when he and Mr. Messer were discussing pill purchases, but she would not be in the same room.

In addition to evidence as to the trafficking of narcotics, the witnesses further testified to the clear correlation between the illegal activity of the Messers and the property sought in the forfeiture petition. The connections between the drug trade and the property generally fell into one of three categories: (1) property which was used by Mr. Messer as a means of transporting or obtaining drugs in order for to sell drugs for his own personal profit; (2) property which was purchased by Mr. Messer in which he used drugs as currency; and/or (3) property which Mr. Messer was able to purchase due to proceeds from drug trafficking.

In regards, to the first category, there was testimony by Mr. Raines that on multiple occasions Mr. Messer traveled to Kentucky and Ohio under the pretense of purchasing horses. During these trips, Mr. Messer would not only buy horses, but would also buy large quantities of pain pills for the purpose of re-distributing the pills in West Virginia. According to Mr. Raines, in order to smuggle the pills into the State, Mr. Messer hid the pills in his truck and in a compartment in his horse trailer and even inserted the pills into the vagina of a horse. Mr. Raines testified about the specifics of the truck (the Dodge dually) and the trailer (with "Messer's Stables" painted on its side) and that each were used on these excursions. Furthermore, Mr. Raines testified that he witnessed Mr. Messer purchase two vehicles at car auction, wherein after the purchase of the cars, Mr. Messer

pulled out huge wads of pain pills. Mr. Raines identified the seized Chevrolet Aveo as one such vehicle.

In regards to the second category, there was testimony which established that Mr. Messer traded pills in exchange for goods and services, as well as testimony as to Mr. Messer accepting stolen goods. Mr. Raines testified that he witnessed Mr. Messer purchase a Massey Ferguson 245 tractor, wherein Mr. Messer's currency for the purchase was a mixture of cash and pills. Mr. Raines also testified that he witnessed Mr. Messer trade pills for ATVs, and Mr. Brown testified that on one occasion he helped Mr. Messer change the "plastics" on an ATV, in order to make it more difficult to trace the true origins of the ATV. All-in-all, Mr. Raines testified that he witnessed twenty to thirty instances of Mr. Messer trading pain pills in exchange for a multitude of items, including chainsaws and weed eaters. Mr. Brown likewise testified that he witnessed Mr. Messer trade pills for miscellaneous farm equipment, including a round hay bale feeder.

The catalyst for the investigation – resulting in the first search warrant – led the officers to a cache of stolen guns which Mr. Messer acknowledged that he knew were likely stolen when he obtained the guns from Mr. Brown. Mr. Brown testified that when he sold the guns to Mr. Messer, Mr. Brown told him that the guns were "probably hot," to which Mr. Messer responded, "that's fine," and then proceeded to buy the guns from Mr. Brown by giving Mr. Brown \$800.00 cash and four Roxicodone® pills. Mr. Raines likewise testified that he witnessed Mr. Messer trading pills in exchange for guns on several occasions, and that he estimated that Mr. Messer acquired thirty to fifty guns by trading

pills. Detective Mellinger testified that the amounts of weapons seized was significant, and the value of the guns was approximately \$15,000.00 for the entire lot.

Furthermore, not only did Mr. Messer use the horse farm as a façade for his drug dealing – by using the pretext of buying horses to smuggle drugs – but he also was able to maintain the farm on the backs of his workers’ addictions. Mr. Raines, Mr. Thompson, and Mr. Brown each testified that they worked for years on the Messer farm, and that during that time, Mr. Messer would pay them in illegal pain pills. Consequently, the laborers necessary to maintain the property were compensated with narcotics.

In regards to the third category, there was testimony which demonstrated that the Messers could not afford much of their personal property, and that there was no legitimate means by which they could have such large sums of cash in their possession. At the time of the initial search warrant, Mr. Messer had not worked in ten years, and the monthly debt of \$1,800.00 – including \$1,000.00 a month to pay for the Messer property – was nearly identical to the amount of the family’s legitimate monthly income. Despite being virtually up-side-down on debt, the Messers not only lived very comfortably, with a multitude of expensive objects in their possession, but were able to horde large bundles of cash. At hearing, the Messers attempted to claim that the cash was from an insurance pay-out from damage to the family farm in the summer of 2012, and from “trading” goods – a hobby of Mr. Messer’s. However, the math, and common sense, simply do not support this claim. Despite the insurance pay-out of \$30,000.00 being less than half of the Messers’ claim in damage, the Messers were able to repair the damage (the farm was in perfect working condition at the time of the execution of the search warrants) and still have more in cash

than the total of the pay-out. Furthermore, Granville Murphy, a trading acquaintance of Mr. Messer's, testified that in a "good year" one might earn \$1,000.00 in trading.

At the conclusion of the hearings, and after receiving the *Proposed Orders* from the parties, the Court ruled that the real property (with the exception of the dwelling house and its immediate surroundings) and all personal property and U.S. currency, with few exceptions, was to be forfeited to the State. The Circuit Court's ruling was based on a careful, step-by-step analysis of the test for forfeiture, as set forth in *Dean v. State*, 230 W.Va. 40, 736 S.E.2d 40 (2012).

III. SUMMARY OF ARGUMENT

This Court should find that the record before the Circuit Court was sufficient to prove, by a preponderance of the evidence, that Sharon Messer had knowledge of the illegal activity, and was complicit in the same. This Court should further find that record before the Circuit Court was sufficient to prove, by a preponderance of the evidence, that there is a substantial connection between the property seized and the illegal drug transaction. This Court should find that the Circuit Court properly applied the analysis set forth in *Dean v. State*.

IV. STATEMENT REGARDING ORAL ARGUMENT

The Respondent contends that oral arguments are not necessary in this matter. Rule 21 of the Rules of Appellate Procedure allows for a memorandum decision where:

(1) this Court finds no substantial question of law and the Court does not disagree with the decision of the lower tribunal as to the question of law; (2) upon consideration of the applicable standard of review and the record presented, this Court finds

no prejudicial error; or (3) other just cause exists for summary affirmance.

Based on the significant record before this court, and the absence of a substantial question of law, the Respondent respectfully submits that it would be appropriate to resolve this appeal by memorandum decision.

V. STANDARD OF REVIEW

When reviewing the applicability of the Excessive Fines Clause to a forfeiture proceeding and “where the issue on appeal is clearly a question of law or involving an interpretation of a statute,” the Court is to apply a *de novo* standard of review. Syl. Pt. 2, *Dean v. State*, 230 W.Va. 40, 45, 736 S.E.2d 40 (2012). *Quoting*, Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995). “In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court’s underlying factual findings are reviewed under a clearly erroneous standard.” Syl. Pt. 1, *State v. Mechling*, 219 W.Va. 366, 633 S.E.2d 311 (2006). *Quoting*, Syl. Pt. 1, *Public Citizen, Inc. v. First Nat. Bank in Fairmont*, 198 W.Va. 329, 480 S.E.2d 538 (1996).

In the present case, the primary errors raised by the Petitioner are factual (i.e. whether there was sufficient evidence to demonstrate Mrs. Messer’s involvement, whether the record supported a finding that seized property was related to drug activity, etc.). Since three of the four assignment of errors raised by the Petitioner are clearly factual, and based solely on the record, this Court should apply a deferential standard of review. The fourth

assignment of error – whether the Circuit Court appropriately applied the tenants of the *Dean* case to the facts at hand – is a question of law, which should be reviewed *de novo*.

VI. ARGUMENT

Pursuant to West Virginia Code, § 60A-7-705(e), the State – the Respondent herein and Petitioner below – has the “burden of proving by a preponderance of the evidence that the seized property is subject to forfeiture.” According to the West Virginia Supreme Court, in forfeiture cases it is the Petitioner’s burden to “demonstrate by a preponderance of the evidence that there is a substantial connection between the property seized and the illegal drug transaction. This finding is in addition to the initial finding of probable cause that an illegal act under the drug law has occurred.” Syl. Pt. 4, *State v. Forty Three Thousand Dollars and No Cents in Cashier’s Checks*, 214 W.Va. 650, 591 S.E.2d 208 (2003).

In *Dean v. State*, the West Virginia Supreme Court held that a forfeiture action brought pursuant to the West Virginia Contraband Forfeiture Act is punitive in nature, and “therefore, subject to the Excessive Fines Clause of article III, section 5 of the West Virginia Constitution and the Eighth Amendment to the United States Constitution.” Syl. Pt. 6, *Dean v. State*, 230 W.Va. 40, 736 S.E.2d 40 (2012). In Syllabus Point 7, the Court further held as follows:

A forfeiture of real property under West Virginia Code §60A-7-703(a)(8) (2010) violates the Excessive Fines Clause...and the Eighth Amendment...if the amount of the forfeiture is grossly disproportionate to the gravity of a defendant’s offense. Factors to be considered in assessing whether the amount of the forfeiture is grossly disproportionate to the gravity of an offense, include: (1) the amount of the forfeiture and its

relationship to the authorized penalty; (2) the nature and extent of the criminal activity; (3) the relationship between the crime charged and other crimes; and (4) the harm caused by the charged crime.

A. The record supports a finding that Sharon Messer had knowledge of the illegal activity.

Without presenting actual argument, the Petitioners allege that there was no evidence present which indicated knowledge of illegal activity on the part of Sharon Messer. In so asserting, the Petitioners claim that Mr. Raines was “clear in stating that he had no knowledge that Sharon Messer was ever involved in any illegal drug transactions or had any knowledge...other than she delivered a container of illegal drugs on occasion to her husband upon his demand.” *Petitioner’s Brief*, pg. 10.

Despite the Petitioners’ claims, the record includes strong circumstantial evidence⁴ of action and knowledge on the part of Mrs. Messer. As testified to by both Mr. Raines and Mr. Brown, Mrs. Messer would bring Mr. Messer containers filled with pills. The containers themselves – a small metal container or a large glass jar – speaks for themselves: no rational-thinking adult would believe that a jar full of various pills of various shapes, sizes, and colors is either normal or lawful. There is simply not a credible argument that Mrs. Messer would get these pills believing that he wanted them for his private use, or that the purpose of the pills was for anything other than illegal purposes. The scenario itself is incredible: while in the presence of third parties, a man would beckon his wife, so that she could bring him a container filled with an assortment of pills, and then, rather than make

⁴ The West Virginia Supreme Court has held that there is “no qualitative difference between direct and circumstantial evidence.” *State v. Guthrie*, 194 W.Va. 657, 669, 461 S.E.2d 163 (1995).

small talk with her husband's guest or stay to socialize, she would immediately scurry off to another part of the property, careful not to watch what happened next. It is all the more disturbing when the containers were filled with a rainbow of pills, but the husband in question was known to have a valid prescription for only one.

The evidence presented before the Circuit Court was that Mrs. Messer not only benefitted from the proceeds of her husband's drug deals, but on occasion, she actually assisted him. In applying a deferential standard of review to the Circuit Court, the Circuit Court's findings are not without merit. Further, there is no claim that the Circuit Court abuse its discretion.

B. The Circuit Court properly applied the analysis set forth in *Dean v. State*, in regards to the comparison of assets and the values to the minimal fine required.

The Petitioner's primary two arguments are that the Circuit Court compared the value of the forfeiture to the maximum fine for Mr. Messer's federal case, and that the record is "void of evidence regarding the values of the property". *Petitioner's Brief*, pg. 13-14. The Respondent will address each of these two issues in turn.

First, the Circuit Court did not err in considering the totality of the consequences that Mr. Messer was facing in considering an appropriate value to be forfeited. As stated, *supra*, Mr. Messer entered guilty pleas to two felony charges in federal court. In addition to a penalty of imprisonment for a period of up to twenty years, Mr. Messer's guilty plea to Count One in the Indictment also included a fine of \$1,000,000.00, or twice the gross pecuniary gain or twice the gross pecuniary loss resulting from Mr. Messer's conduct, whichever is greater. In addition to a penalty of imprisonment for a period of up to ten

years, Mr. Messer's guilty plea to Count Three in the Indictment also included a fine of \$250,000.00, or twice the gross pecuniary gain or twice the gross pecuniary loss resulting from Mr. Messer's conduct, whichever is greater.⁵ By means of his plea in federal court, Mr. Messer is facing imprisonment for a period of up to thirty years, and a fine of *at least* \$1,250,000.00.

In *Dean*, the Court held that “[b]ecause the forfeiture action was initiated under state law, the authorized penalty by which the amount of the forfeiture must be compared with is the penalty to which the Petitioner is subject to under West Virginia law, not federal law.” *Dean*, 230 W.Va. 40, 51. In its filing below, the Respondent erroneously argued to the contrary of the *Dean* holding. Despite this inadvertent, prior misstatement of the law, the Respondent maintains that it is entitled to the forfeiture, as ordered by the Circuit Court.

In the present case, the State initially charged Mr. Messer with a sole felony count of “Receiving or Transferring Stolen Goods in Excess of \$1,000.00,” in violation of West Virginia Code, § 61-3-18. The penalty for this charge is imprisonment in the penitentiary for not less than one nor more than ten years, or, in the discretion of the court, confinement in jail not more than one year, and a fine of not more than \$2,500.00. During the investigation of the stolen firearms, however, the State discovered that it was dealing with a different animal, altogether. The firearms were merely “chicken feed” compared to the

⁵ The pled-to charges also require a term of supervised release for at least three years, and an order of restitution. Mr. Messer is scheduled for sentencing January 29, 2015 in federal court.

full breadth of the criminal enterprise that that had actually been transpiring over at least the past seven years.

Although only one State charge had been filed at the time against Mr. Messer, based upon information provided by and eventual sworn testimony of Mr. Raines, Mr. Thompson, Mr. Casto, and Mr. Brown, the State could potentially charge hundreds, if not thousands, of counts of “Delivery of a Controlled Substance – Schedule II Narcotic”, in violation of West Virginia Code, § 60A-4-401(a)(i), for which *each count* would carry a possible penalty of imprisonment in the state correctional facility for not less than one nor more than fifteen years, or fined not more than \$25,000.00, or both imprisonment and fine. Assuming Mr. Messer was charged with merely Two Hundred Fifty counts of individual deliveries of controlled substances (a fraction of the number of deliveries testified to by the aforementioned witnesses), the maximum fine to which Mr. Messer would be subjected is Six Million Two Hundred Fifty Thousand Dollars (\$6,250,000.00), and *easily* exceeds the value of the property forfeited to the State in the underlying action. That potential fine could be quadrupled based upon the testimony presented in Circuit Court and would not include any conspiracy charges that could be filed against and involving Mrs. Messer. The Circuit Court used sound judgment in determining that short of the Messer farm sitting atop an operational gold mine or a gushing oil well, the property set forth in the Forfeiture Petition could not begin to reach the monetary value of the fines potentially assessed against the Messers. On the other hand, at least an operational gold mine could account for the unexplained income that the Messers would have had to have accumulated to lawfully acquire the property sought below.

The State did not charge the multitude of delivery counts for the same reason that it has not indicted Mr. Messer on the one count of “Receiving or Transferring Stolen Goods in Excess of \$1,000.00”: the State did not believe that it was responsible to expend valuable resources to prosecute a case where the potential defendant has already pled guilty in federal court, and is subsequently facing up to thirty years imprisonment. Neither the *Dean* case nor the West Virginia Contraband Forfeiture Act, §§ 60A-7-701 *et seq.* requires that the State obtain a conviction prior to proving a forfeiture case, nor does either law require that a charge is even filed. In this case, the evidence proved *by a preponderance of the evidence* – not beyond a reasonable doubt – that Mr. Messer committed an enumerable amount of illegal deliveries of oxycodone and hydrocodone to various individuals. Likewise, testimony as to Mrs. Messer’s involvement implicates her in several delivery charges, as a principle in the second degree and could subject her to numerous conspiracy charges. Consequently, the maximum fine to which Mr. and Mrs. Messer were subjected is nearly incalculable.

Based upon the evidence presented to the lower court, there is no gold mine or oil well on the 54 acres of property; the equipment was regular run-of-the-mill ATVs, chainsaws, vehicles, etc., and; the cash was worth its face value. There is simply no reason that the Circuit Court judge could not have applied a forfeiture analysis that would satisfy the most skeptical mind that the property forfeited did not have the slightest chance of reaching the amount of over Twenty Million Dollars (\$20,000,000.00) in potential fines the criminal charges would encompass. On a *de novo* review of the record, the possible

penalty that the Messers were facing was not only proportional to the forfeited property, as a matter of law, it was a drop in the proverbial bucket.

C. The record supports a finding that the seized property was purchased pursuant to illegal drug transactions and/or was the product of an illegal drug transaction and/or was connection to illegal drug activity.⁶

Finally, the Petitioners argue that the record does not show enough of a causal connection between the illegal drug transactions and the forfeited items. The Respondent whole-heartedly disagrees. As set forth in the record below, and as incorporated in the *Statement of Facts, supra*, the evidence demonstrated that each and every bit of forfeited property, whether real or personal, was implicated in some way, whether direct or indirect, in the Messer drug trade: the horse farm was used as a front for going out of state to smuggle drugs in West Virginia; Mr. Messer used pain pills like currency, to trade for everything from tractors to firearms; and the items on the property far exceeded what the Messers could afford, while conversely the testimony at hearing indicated that Mr. Messer frequently flaunted the astronomical cash proceeds he made in selling pills. Mr. Messer did not only sell drugs, he gave drugs to Mr. Raines and Mr. Brown in order for them to sell drugs on his behalf.

Unlike in *Dean*, where the circuit court ruled for the State by summary judgment, in this case the Circuit Court heard a considerable amount of evidence, evidence which showed a cancerous and persistent trafficking of pain pills. The extent of the criminal activity is shocking. Furthermore, said criminal activity is interconnected to the seized

⁶ For brevity's sake, the Respondent has consolidated the Petitioner's third and fourth assignments of errors, which are essentially the same.

property: the car Mr. Messer bought at an auction, in order to take pills from a hidden compartment; the stolen guns Mr. Messer bought by paying Mr. Brown in cash and pills; the farm the Messers were able to maintain by paying their laborers in pills; and the large amounts of cash that each of the State's lay witnesses testified to being the proceeds of pills, including thousands of dollars that they themselves gave to Mr. Messer in exchange for drugs. In applying a deferential standard of review to the Circuit Court, the Circuit Court's findings are not without merit. Further, there is no claim that the Circuit Court abused its discretion.

VII. CONCLUSION

For the foregoing reasons, the ruling of the Circuit Court should be affirmed.

Respectfully submitted,

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Prosecuting Attorney of Jackson
County, West Virginia, on behalf
of Jackson County Sheriff's
Department,

By counsel,



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APPENDIX

Exhibit A. List of All Seized Property.....i-iii

EXHIBIT A. LIST OF ALL SEIZED PROPERTY

Real Property

All real property, including any residences/mobile homes/dwellings, located at Rt. 1 Box 149-A, Gay, WV, listed in Map Book 32, being 54.09 acres, Beech Fork, Washington District, Jackson County, WV, owned and/or possessed by Hubert Dwayne Messer and Sharon (White) Messer)

Personal Property

\$32,641.00 in U.S. Currency

\$2,345.00 in U.S. Currency

\$356.00 in U.S. Currency

Remington Model 7600 .243 Caliber with Scope (SN 8531416)

Oregon Arms .22 Caliber Bolt Action (#40651)

Winchester Model 94 .30-30 Caliber (#1341815)

Remington Model 6 .22 Caliber Rifle (#461293)

Smith/Wesson M&P 1522 .22 Caliber (#DYZ24087)

Arms Company .22 Caliber Pistol (#046001)

Mossberg Model 500 12 Gauge, Camo (#7377219)

Mossberg Model 500 12 Gauge (#6156335)

Remington Model 870 .28 Gauge (#T420632J)

Winchester Model 12 Gauge (#1589951)

Winchester Model 1911 (#47981)

Savage Model 24 20 Gauge .22 (#A815782)

H&R 10 Gauge Camo Single-Shot (#AS234253)

Remington Model 700 .243 with Scope (#A6523475)

Mossberg 20 Gauge Model 500 (#D02152)

Marlin Model 60 .22 Rifle (#97412395)

Remington Model 870 20 Gauge (#T310682X)

Remington Model 700 .30-06 (#E6519454)

Remington 512-X .22 Caliber (*serial number unknown*)

Remington Sportman 12 Gauge (#W152137M)

Winchester Model 37 20 Gauge (*serial number unknown*)

Winchester Model 37 12 Gauge (*serial number unknown*)

Winchester Model 37 .410 (*serial number unknown*)

Winchester Model 37 16 Gauge (*serial number unknown*)

Winchester Model 290 .22 Caliber (#B1604083)

Remington Model 514 .22 Caliber (*serial number unknown*)

Remington 760 .270 Caliber (#A7401327)

Unknown .22 Caliber Rifle Light Color, Wood (*serial number unknown*)

Remington Model 870 20 Gauge (#T508081X)

CVA Muzzleloader, Camo, with Scope (#61-13-015724-02)

NEF .25-06 Laminated Handi Rifle (#NP272191)

Remington Targetmaster .22 Rifle (*serial number unknown*)
Remington .30-06 7400 Auto (#8278913)
Savage 22 Rifle (#55887)
Savage 22 Rifle Syn Stock (#398456)
Remington 870 12 Gauge (#AB958529M)
Winchester 1200 (#L560108)
Marlin 22 (#11515692)
Tarus 38 Special (#VA68760)
Ruger 380 LCP (#374-61585)
“Deringer” North American Arms 22 (#E137962)
“Deringer” 22 (#L023220)
Crossbow Tornado (*no serial number*)
Mathews Compound Bow, Camo
Alphine Micro Compound Bow, Camo
Camo Tent/Groundmax
Toro 18HP Lawn Mower (#220000352)
Troy Bilt 21” Push Lawn Mower (#1F021K31362)
MTD Riding Lawn Mower with 42” Deck (#1C165B7246)
Troy Bilt Edger (#10112DK1426)
Weedeater (#264145717)
Stihl Weedeater
Poulan Weedeater
Husqvarna Pressure Washer Model 900 (#1019567760)
Briggs/Straton 580 Pressure Washer (#1019074333)
Coleman Powermate Generator (#90020404)
General GP5500 Generator (#6751763E)
Craftsman 6HP 32 Gallon Air Compressor (#2002192911)
Sthil M5440 Chainsaw (#FS45C)
Husqvarna Chainsaws, x3
Milwaukee Saws All
Passload Nailers F3505, x2
Dewalt Hammer Drill (#907524)
Honda Foreman ATV CS (#1HFTE317X84300571)
Yamaha Rhino ATV (#5Y4AM20459A002092)
Century Safe (Black)
Black Cannon Gun Safe w/Unknown Contents
River’s Edge Tree Stand
Green Ammo Can Filled with Ammo
Bucket Filled with Ammo
2007 Dodge 3500 Dually Truck, white in color, VIN#3D7MX49C87G730087
Filled with numerous hard-sided and soft-sided gun cases
2000 Ford F350 Truck, white in color, VIN#1FTSX31FXyec08944
2005 Chevrolet Aveo Burgandy in Color (VIN#KL1TD52615B304781)

1999 Mazda 3400 X-Cad Truck, Tan (VIN#4F4ZR17X7XTM08050)
6-foot Red Brush Hog
6-foot Yellow Brush Hog
Mahindra 4WD Model 5530 Tractor w/Loader (#SRSM1227 J7)
Massey Ferguson 245 Tractor w/Box Blade (*VIN unknown*)
“Messer Stables” Aluminum Stock Fifth-Wheel Trailer, VIN#4LAAS242665036787
Filled with numerous saddles, bridles, leads, and equine equipment
Aluminum Gooseneck Stock Trailer (VIN#4FGL4242XC044098)
White Horse Trailer (*VIN unknown*)
Gator 30-foot Gooseneck Utility Trailer (VIN #4Z1GF302X7S003421)
16-foot Gator Brand Dump Trailer (VIN# 5LEBK182491007169)
16-foot Utility Trailer (*VIN unknown*)
Farm Pro Trak King Yellow Dozer (*serial number unknown*)
Eight Lug Aluminum Wheels w/Used Tires, x4
Camo Tent/Groundmax
EX Go Brand Red Golf Cart (*serial number unknown*)
Wolfe System 24X Power Tanning Bed (#SPIH89501)
Wildgame Trail Camera
Wildgame Innovations Trail Camera
Moultrie Trail Camera
Horse Saddles, x8

CERTIFICATE OF SERVICE

I, Kennad L. Skeen, II, Prosecuting Attorney for Jackson County, West Virginia, and counsel for the Respondent, do hereby certify that I served the *Brief of Respondent* on the 22nd day of January, 2015, by placing a copy of the same, addressed as follows:

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